

**UNITED STATES COURT OF APPEALS**

**For the Fifth Circuit**

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No. 92-7572 & 93-7132

Summary Calendar

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United States of America,

Plaintiff/Appellee,

VERSUS

Ricardo Gonzalez-Fuentes,

Defendant/Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas

(92-CV-449)

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(January 5, 1994)

Before WISDOM, JOLLY, and JONES, Circuit Judges.

WISDOM, Circuit Judge.\*

The defendant/appellant, Ricardo Gonzalez-Fuentes, appeals his conviction for possession of marijuana with intent to distribute. His primary basis for appeal is that the police conducted an impermissibly suggestive pre-trial identification procedure. Without that identification, he contends, the evidence is

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decided particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

insufficient to sustain his conviction. We hold that the identification procedure, although subject to criticism, was sufficiently reliable under the "totality of the circumstances" principle for the

identification testimony to be properly admitted. We affirm the judgment of the district court.

## I.

On March 24, 1992, at 7:30 p.m., Border Patrol Agent Dick Allen parked his car on Farm Market Road 1017, just south of Hebronville, Texas, a town not far from the U.S. border with Mexico. Under skies dimming with the onset of dusk, he noticed three vehicles apparently in tandem -- a blue Lincoln Town Car, a white Ford utility truck, and another white passenger car -- driving slowly, no more than 30 miles per hour. He turned on his headlights which focussed on the cars.

Allen testified that as the blue Lincoln passed in front of him, he was able to observe the driver clearly enough to be able to identify him subsequently. Allen testified that the driver was a Hispanic male with a pencil-line moustache, a slanted forehead, and a hooked nose, wearing a dark shirt with shiny collar tips and a cowboy hat.

When Allen turned on his lights, the three cars sped off in different directions. Allen chased the Lincoln at high speeds until the driver stopped the car and fled on foot. Agent Allen's dog, trained to detect illicit substances, sniffed at the trunk of the car signalling that it contained contraband. Sure enough, upon inspection, Allen discovered approximately 600 pounds of marijuana worth an estimated \$268,000.

The following day, a convenience store employee called the Sheriff's office to report a suspicious-looking man with fresh surface injuries. The employee testified that the man, who later was identified as the defendant, Gonzalez-Fuentes, wore boots, blue jeans, and a western shirt, and appeared dazed. When the employee asked him about the wounds, he attributed them to a car accident.<sup>1</sup> During that interaction, Gonzalez-Fuentes asked where he could buy a bus ticket. On this tip from the employee, the Sheriff's deputies were able to locate the defendant in a nearby motel. The deputies detained him.

That same day, fifteen hours after chasing the blue Lincoln, Agent Allen received a telephone call from the deputies. The deputies explained that they held a man that they believed had

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<sup>1</sup>No car accident was reported in that area.

participated in the marijuana smuggling operation. They asked Allen to come to a doctor's office and determine, if he could, whether the man they held was the driver of the blue Lincoln.<sup>2</sup> Immediately upon his arrival, Agent Allen identified Gonzalez-Fuentes as the driver of the blue car.

Gonzalez-Fuentes was indicted for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute in violation of 21 U.S.C. §§ 846 and 841. Upon a motion by the government, the conspiracy count was dropped; Gonzalez-Fuentes was tried for possession with intent to distribute.<sup>3</sup> The jury found him guilty, doubtless in large part on the basis of Allen's pre-trial and in-trial identifications. The district judge sentenced Gonzalez-Fuentes to 115 months in prison and five years of supervised release.<sup>4</sup> This appeal followed.<sup>5</sup>

## II.

Gonzalez-Fuentes's principal contention is that the pre-trial identification procedure -- Agent Allen's identification of the defendant at the doctor's office -- violated his Fifth Amendment right to due process and, consequently, tainted any subsequent identification that Allen could make. Without this key piece of evidence, he argues, sufficient evidence does not exist to tie him to the marijuana discovered.

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<sup>2</sup>Gonzalez-Fuentes had asked the deputies for medical attention. He explained to the deputies that his injuries were the result of a barroom brawl in which he had participated the previous night. He could not name the bar, however, and the doctor who treated his injuries indicated that their relative superficiality made it unlikely that they had been inflicted by a knife, as Gonzalez-Fuentes asserted. Instead, the wounds were evenly spaced and shallow -- compatible with the type of cuts that barbed wire inflicts.

<sup>3</sup>Against the advice of the trial judge, Gonzalez-Fuentes insisted that he be tried in jail clothing.

<sup>4</sup>The court also sentenced Gonzalez-Fuentes to 120 days for refusing to submit to palm prints. Although the government later withdrew its request for the prints, the court nonetheless found him guilty of contempt. The court also ordered a special assessment against the defendant of \$50.

<sup>5</sup>Gonzalez-Fuentes's appointed counsel filed a motion seeking to withdraw from this case, within the guidelines established in Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493 (1967). He filed a brief challenging the sufficiency of the evidence and the sentence for contempt. This Court denied the sufficiency challenge but directed counsel to brief any non-frivolous issue. See United States v. Gonzalez-Fuentes, Nos. 92-7572 & 93-7132 (5th Cir. Jul. 9, 1993) (unpublished). Although Gonzalez-Fuentes discusses sufficiency of the evidence in response to that order, he does so in the context of his challenge to the pre-trial identification procedure.

The question whether the identification in the doctor's office was improper is a mixed question of law and fact.<sup>6</sup> The standard of review is dictated by the defendant's failure to challenge the identification procedure before this appeal. Because the contemporaneous objection rule applies, we reverse the district court only for plain error.<sup>7</sup> To constitute plain error, the error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings."<sup>8</sup> A determination that a substantial risk of misidentification existed constitutes plain error.<sup>9</sup>

### III.

In determining whether a pre-trial identification procedure violates a defendant's due process rights, this Court examines "the totality of the circumstances".<sup>10</sup> To that end, we employ a two-part test. First, we examine whether the procedure was unduly suggestive. Second, we determine whether the procedure created a substantial likelihood of misidentification.<sup>11</sup> This analysis similarly applies where the defendant argues, as Gonzalez-Fuentes does here, that the improper pre-trial identification renders the evidence insufficient to sustain his conviction.<sup>12</sup>

It must be said that the pre-trial identification procedure employed in this case has aspects that expose it to criticism. The morning after Agent Allen first viewed the passing cars, he was asked to come to the doctor's office "to identify Gonzalez as the driver of the vehicle, a Lincoln, four door." When Allen arrived, Gonzalez-Fuentes was standing in the hallway outside the doctor's office talking with a county investigator. The deputies made no attempt to conduct a formal police line-up;

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<sup>6</sup>United States v. Sanchez, 988 F.2d 1384, 1389 (5th Cir.), cert. denied, 114 S.Ct. 217 (1993).

<sup>7</sup>Id.

<sup>8</sup>United States v. Olano, \_\_\_ U.S. \_\_\_, \_\_\_, 123 L.Ed.2d 508, 518 (1993) (citations omitted).

<sup>9</sup>See United States v. Mann, 557 F.2d 1211, 1216 n. 5 (5th Cir. 1977).

<sup>10</sup>Herrera v. Collins, 904 F.2d 944, 947 (5th Cir.), cert. denied, 498 U.S. 925 (1990) (citing Manson v. Brathwaite, 432 U.S. 98, 114, 53 L.Ed.2d 140, 154 (1977)).

<sup>11</sup>United States v. Shaw, 894 F.2d 689, 692-93 (5th Cir.), cert. denied, 498 U.S. 828 (1990).

<sup>12</sup>See United States v. Bryant, 991 F.2d 171, 176 n. 6 (5th Cir. 1993).

Gonzalez was the only suspect present. All of the other people present were law enforcement officers. Unlike a line-up which forces a witness to confront the frailties of his perception and memory, here Allen had but two choices: implicate or exonerate the one person before him. This procedure puts at a disadvantage any man who fits a general stereotype.<sup>13</sup>

Our inquiry, however, does not end there. The second step of our analysis concerns whether there existed a substantial likelihood of misidentification. In analyzing this step, we look to the overall reliability of the identification.<sup>14</sup> We focus primarily on six factors:

(1) the opportunity of the witness to view the criminal, (2) the witness' degree of attention, (3) the accuracy of the description, (4) the witness' level of certainty, (5) the elapsed time between the crime and the identification, and (6) the corrupting influence of the suggestive identification itself.<sup>15</sup>

The ultimate standard is the procedural fairness required by the Due Process Clause of the Fifth Amendment.<sup>16</sup>

Agent Allen had only five seconds in which to view the driver of the car as the car passed him. The lighting further limited his opportunity. Not only did Allen view the car at dusk, but the man driving the car wore a cowboy hat, presumably casting a shadow over his face. On the other hand, the car was travelling slowly and at one point was not more than 5-10 yards from Allen. Allen also testified that the driver looked at him three times within that brief span.<sup>17</sup>

Allen's degree of attention was great. He was positioned along the side of the road

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<sup>13</sup>The government does not assert that an exigency existed which might excuse the otherwise suggestive nature of the procedure employed. Compare Stovall v. Denno, 388 U.S. 293, 302, 18 L.Ed.2d 1199, 1206 (1967), which applied the totality of the circumstances test to allow an otherwise impermissibly suggestive identification where the near-death witness was the only person who could exonerate the suspect.

<sup>14</sup>Shaw, 894 F.2d at 692.

<sup>15</sup>United States v. Atkins, 698 F.2d 711, 713 (5th Cir. 1983); Manson, 432 U.S. at 114, 53 L.Ed.2d at 154.

<sup>16</sup>See Manson, 432 U.S. at 113, 53 L.Ed.2d at 153.

<sup>17</sup>But see Herrera, 904 F.2d at 948, holding that an identification was reliable where headlights illuminated a suspect fifteen feet away from the witness.

specifically to observe the traffic passing him. A law-enforcement officer with seven years of experience at the time, Allen was trained in the techniques of observation and identification. We have, in the past, accorded greater weight to witnesses with law enforcement training than to lay people observing similar activity.<sup>18</sup>

The defendant argues that because Allen's attention was focused on all three vehicles, he could not have rivetted on the driver of the blue Lincoln. Allen testified, however, that he viewed the driver for five seconds and, in the light of the jury's verdict, we can only conclude that for those five seconds, his attention was exact. Given that the blue Lincoln led the procession, it is reasonable that Allen would have concentrated his attention on its driver.

Allen described the driver of the car as a man wearing a dark cowboy shirt and a white cowboy hat and having a pencil-line mustache. He also noticed that the driver's forehead was "slanted back" and his nose was "hooked". The convenience store clerk who observed Gonzalez-Fuentes the following morning testified that Gonzalez-Fuentes was, in fact, wearing a dark cowboy shirt. He indicated further that Gonzalez-Fuentes had a light mustache and a goatee. Allen's description was reasonably accurate, although it seems to fit within a general description of many Hispanic males.<sup>19</sup>

Agent Allen, as the witness in this case, has maintained a high level of certainty from the time that Gonzalez-Fuentes was arrested until the time he was convicted. Allen contends that he immediately recognized Gonzalez-Fuentes as the driver of the blue car upon entering the hallway outside the doctor's office. At trial, he reiterated his certainty that Gonzalez-Fuentes was the driver he saw that night.

His memory was fresh. Only fifteen hours elapsed between the time that Allen first saw the driver of the blue car and the time that he identified Gonzalez-Fuentes as that driver outside of the doctor's office. Both Allen's certainty and the short amount of time strengthen the reliability of the

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<sup>18</sup>See, e.g., United States v. Manotas-Mejia, 824 F.2d 360, 369 (5th Cir.), cert. denied, 484 U.S. 957 (1987), in which the court showed deference to trained officers who are, by virtue of their job, attentive to detail even under pressure.

<sup>19</sup>See United States v. Watkins, 741 F.2d 692, 695 (5th Cir. 1984).

identification.<sup>20</sup>

In the light of our evaluation of the factors to be considered, we conclude that, while the procedure employed had some aspects of being unduly suggestive, sufficient indicia of the reliability of the identification exist. These factors render the likelihood of a misidentification far short of the "substantial" threshold. For that reason, we cannot say that the district court committed plain error when it admitted Allen's identification of the defendant and sent this case to the jury.

#### IV.

Gonzalez-Fuentes does not state clearly whether he challenges the sufficiency of the evidence as an issue separate from his contention that the pre-trial identification should not have been admitted. In any case, because we hold that Agent Allen's identification was properly admitted, the evidence is sufficient to sustain Gonzalez-Fuentes's conviction.

Typically, in considering a challenge to the sufficiency of the evidence, this Court views the evidence in a light most favorable to the government and determines whether a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.<sup>21</sup> The government incorrectly asserts that a higher threshold applies to the present matter. The government charges that, although Gonzalez-Fuentes moved for a judgment of acquittal at the end of the government's case, he failed to do so after all of the evidence was received.<sup>22</sup> Gonzalez-Fuentes did renew his motion for a judgment of acquittal before the case went to the jury. We apply the usual standard.

In order to sustain a conviction for possession with intent to distribute marijuana, the

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<sup>20</sup>Manson, 432 U.S. at 114, 53 L.Ed.2d at 154.

<sup>21</sup>United States v. Prieto-Tejas, 779 F.2d 1098, 1101 (5th Cir.), reh'g. denied, 783 F.2d 1260 (1986).

<sup>22</sup>Where a defendant fails to renew his motion for judgment of acquittal at the close of all of the evidence, we limit our review to determine only whether "a manifest miscarriage of justice" occurred; i.e., "the record is devoid of any evidence pointing to guilt". United States v. Robles-Pantoja, 887 F.2d 1250, 1254 (5th Cir. 1989).

government must prove: (1) knowing (2) possession of marijuana (3) with intent to distribute it.<sup>23</sup> The government may prove possession with direct and circumstantial evidence.<sup>24</sup> Moreover, possession may be actual or constructive.<sup>25</sup> Constructive possession is the right or power to exercise ownership or control over the proscribed substance.<sup>26</sup> Intent to distribute may be inferred from the possession of a large quantity of a proscribed substance.<sup>27</sup>

The evidence admitted is sufficient to allow a reasonable fact finder to convict the defendant. It is not disputed that Agent Allen's identification of the defendant as the driver of the blue Lincoln is the linchpin of the government's case. Other evidence exists as well. Boot prints found at the scene of the crime matched the general print of the defendant's boots (although they were of an admittedly common type). A cowboy hat with bloodstains was discovered which fit Gonzalez-Fuentes (although the bloodstains were not extensive enough to permit a comparison with the defendant's blood). The defendant was alone in this small town, without transportation, looking for a place to pick up a bus ticket. His clothing was torn in a pattern that suggested barbed wire as the cause. His barroom brawl alibi was inconsistent and implausible and he offered no explanation for his presence in this small Texas town. In sum, the evidence was sufficient to sustain his conviction.

## V.

Last, the defendant challenges his contempt sentence stemming from his refusal to provide palm prints. Gonzalez-Fuentes argues that he refused to give palm prints in the good faith belief that the United States Constitution protected him from being compelled to do so. The district court judge informed the defendant in no uncertain terms that his construction of our Constitution was erroneous

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<sup>23</sup>United States v. Diaz-Carreón, 915 F.2d 951, 953 (5th Cir.), reh'g. denied, 919 F.2d 735 (1990).

<sup>24</sup>United States v. Vergara, 687 F.2d 57, 61 (5th Cir. 1982).

<sup>25</sup>Id.

<sup>26</sup>Id.; United States v. Posner, 868 F.2d 720, 723 (5th Cir. 1989).

<sup>27</sup>United States v. Martínez-Mercado, 888 F.2d 1484, 1491 (5th Cir. 1989).

and, further, that if he persisted in refusing, he would expose himself to sanctions.<sup>28</sup> Undaunted by that admonition, Gonzalez-Fuentes again refused to submit to the palm prints. The district court was within its discretion to penalize him for doing so.

VI.

For the foregoing reasons, Gonzalez-Fuentes's conviction is AFFIRMED.

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<sup>28</sup>See United States v. Balliro, 558 F.2d 1177, 1178-79 (5th Cir. 1977) (per curiam) (refusal to give palm prints subjected defendant to contempt penalties).